

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 PATRICK O'HARA,

12 Petitioner,

13 v.

14 JAMES HARTLEY, Warden, et al.,

15 Respondents.
16
17

Civil No. 10-2225 WQH (PCL)

ORDER:

**(1) GRANTING APPLICATION TO
PROCEED IN FORMA PAUPERIS; and**

**(2) DISMISSING CASE WITHOUT
PREJUDICE AND WITH LEAVE TO
AMEND**

18 Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas
19 Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

20 **MOTION TO PROCEED IN FORMA PAUPERIS**

21 Petitioner has \$0.00 on account at the California correctional institution in which he is
22 presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS**
23 Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the
24 above-referenced action as a poor person without being required to prepay fees or costs and
25 without being required to post security. The Clerk of the Court shall file the Petition for Writ
26 of Habeas Corpus without prepayment of the filing fee.

27 ///

28 ///

FAILURE TO NAME PROPER RESPONDENT

Review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

The warden is the typical respondent. However, “the rules following section 2254 do not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v. Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the body” if directed to do so by the Court. “Both the warden of a California prison and the Director of Corrections for California have the power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d at 895.

Here, Petitioner has incorrectly named “James Hartley, Warden,” as Respondent. In order for this Court to entertain the Petition filed in this action, Petitioner must name the warden in charge of the state correctional facility in which Petitioner is presently confined or the Director of the California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

///

///

CONCLUSION

Accordingly, the Court **GRANTS** Petitioner's motion to proceed in forma pauperis and **DISMISSES** the Petition without prejudice and with leave to amend. To have this case reopened, Petitioner must, **no later than January 3, 2011**, file a First Amended Petition which cures the pleading deficiencies outlined in this Order.

IT IS SO ORDERED.

DATED: November 2, 2010


WILLIAM Q. HAYES
United States District Judge